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SUPREME COURT OF THE UNITED STATES.

2 Cahpman
3 Wallace

No. ~~310.~~ ~~276~~ 60 5

THE COUNTY OF LANE, PLAINTIFF IN ERROR,

taxes payable in Gold

vs.

THE STATE OF OREGON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

Gold & Silver Coin

GOVERNMENT PRINTING OFFICE.

Legal tender act
Reorganization of the court after
case Dec 1868
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SUPREME COURT OF THE UNITED STATES.

No. 310.

THE COUNTY OF LANE, PLAINTIFF IN ERROR,

vs.

THE STATE OF OREGON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

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1 In the circuit court of the State of Oregon for the county of Lane.

STATE OF OREGON, pl'ff,
vs.
LANE COUNTY, def't.

The abovenamed plaintiff comes and complains of the abovenamed defendant, and for cause of action says, the amount of State revenue due to the plaintiff from the defendant for the year A. D. 1863 is five thousand four hundred and sixty and $\frac{96}{100}$ dollars in gold and silver coin, which said sum, on the first Monday in February, A. D. 1864, was duly charged on the books of the secretary of state and on the books of the State treasurer against the said defendant, and that the said sum stands so charged against said defendant, and remains unpaid; that said sum was due to the plaintiff on the first Monday of February, 1864, and although so due, the same has not been paid nor any part thereof.

Whereupon plaintiff prays judgment against said defendant for the said sum of five thousand four hundred and sixty and $\frac{96}{100}$ dollars in gold and silver coin, and the costs and disbursements of this action.

WILLIAMS & MALLORY, *Pl'ff's Att'ys.*

2 I, Samuel E. May, secretary of state of the State of Oregon, being duly sworn, depose and say the matter stated in the foregoing complaint is true, as I verily believe.

SAMUEL E. MAY.

Subscribed and sworn to before me this 5th day of April, A. D. 1865.

Witness my hand and official seal.

[L. S.] CHESTER N. TERRY, *Notary Public.*

In the circuit court of the State of Oregon for the county of Lane.

STATE OF OREGON, pl'ff,
vs.
LANE COUNTY, def't.

To Lane county, defendant:

In the name of the State of Oregon you are hereby summoned to be and appear in the circuit court of the State of Oregon for the county of Lane within ten days after the service of this writ and answer the complaint on file against you in said court, or judgment for the sum of five thousand four hundred and sixty and $\frac{96}{100}$ dollars in gold and silver coin will be rendered against you if you fail to
3 appear and answer.

WILLIAMS & MALLORY, *Pl'ff's Att'ys.*

STATE OF OREGON, *County of Lane, ss:*

I certify that I have served the summons, complaint, and affidavit in the above-entitled cause, The State of Oregon *vs.* Lane County, by

delivering to the county clerk of said county a copy hereof duly certified to by plaintiff's att'ys, at Eugene city, in said county, on the 7th day of April, 1865.

WM. H. HALEY, *Sheriff.*

Fees: Serving, $0 50; making return, 25.

Filed April 7th, 1865.

A. A. SKINNER, *County Clerk.*

In circuit court, Lane county.

Answer.

STATE OF OREGON, pl'ff,
ve.
LANE COUNTY, def't.

The said defendant, Lane County, by Risdon & Elsworth, its attorneys duly authorized to appear and defend this action by the county court of Lane County, for an answer to the complaint, saving and expressly reserving an objection thereto that it does not contain facts sufficient to entitle the plaintiff to a judgment as prayed for, alleges as follows, to wit, and alleges that the sum specified in the complaint does not remain unpaid, and did not remain unpaid on the first Monday of February, 1864; and denies that the said sum has not been paid nor any part thereof, but, on the contrary, alleges that the defendant did, on or about the 23d day of January, 1864, tender and offer to pay to the plaintiff, to wit, the State treasurer, at his office in Salem, Marion county, Oregon, the said sum of ($5.460 96) five thousand four hundred and sixty $\frac{96}{100}$ dollars as specified in the complaint, in lawful money of the United States, to wit, in U. S. treasury or legal-tender notes, commonly known as greenbacks, as issued in pursuance of various acts of Congress, especially that of February 25th, 1862, and such lawful money so tendered and offered was in truth and in fact out of the first money collected and paid into the county treasury of Lane county after the assessment of said taxes for said year 1863.

And def't further says that said sum of five thousand four hundred and sixty $\frac{96}{100}$ dollars so tendered and offered in lawful money to the plaintiff on said 23d day of January, 1864, has been ever since then and now is ready for the plaintiff, whereof the plaintiff has at all times had notice, and the same is brought now here into court for the plaintiff; which said offer and tender and readiness to pay in lawful money as aforesaid the defendant now pleads in bar of plaintiff's right to recover in this action; and defendant prays judgment for costs and disbursements.

RISDON & ELSWORTH and
KELSEY & THAYER, *Def't's Att'ys.*

LANE COUNTY, *ss:*

I, A. A. Skinner, of said county, being duly sworn, depose and say that I am county clerk of Lane county, defendant in above action, and the foregoing answer is true as I verily believe.

A. A. SKINNER.

6 Subscribed and sworn to before me this 15th day of April, A. D. 1865.

D. M. RISDON, *County Judge.*

The plaintiff's attorneys hereby admit and stipulate that the treasury notes alleged to be brought into court in the answer herewith filed is deemed to be brought into court for all the purposes of this action.

WATSON, WILLIAMS & MALLORY, *Pl'ff's Att'ys.*

Filed April 15th, 1865.

A. A. SKINNER, *County Clerk.*

In circuit court, Lane county.

Demurrer.

STATE OF OREGON, pl'ff,
vs.
LANE COUNTY, def't.

Plaintiff comes, by J. F. Watson, pros. att'y, and by Williams & Mallory, att'ys for the State, and demurs to the defendant's answer, for the reason that the same does not state facts sufficient to constitute a defence, for the reason—

1st. The answer does not show that the money alleged to have
7 been tendered to the State treasurer was in gold and silver coin.

2d. The answer does not show that any tender was ever made as required by law.

3d. The facts stated are not sufficient to constitute a defence.

WATSON, WILLIAMS & MALLORY,
Att'ys for Pl'ff.

Filed April 18th, 1865.

A. A. SKINNER, *Co. Clk.*

Be it remembered, that at a term of the circuit court of the State of Oregon for the county of Lane, begun and held at the court-house, in Eugene City, in said Lane county, on the third Monday, the seventeenth day of April, in the year of our Lord one thousand eight hundred and sixty-five, the following, among other proceedings, were had in said court, to wit:

Saturday, the sixth day of the term, April 22d, 1865.

Civil suit.

STATE OF OREGON
vs.
LANE COUNTY.

8 This cause came on to be heard on complaint, answer, demurrer to answer, and motion to strike out certain words from

the complaint, and after hearing argument of counsel, to wit, Mallory & Watson for the plaintiff, and Risdon, Elsworth, and Kelsey for defendant, the court took the same under advisement for further consideration.

That afterwards, to wit, Friday, August fourth, (4th,) A. D. 1865, the court rendered the following judgment, to wit:

Civil action.

STATE OF OREGON
vs.
LANE COUNTY.

At the last term of this court this cause came on to be heard upon demurrer to the defendant's answer, and was argued by counsel and taken under advisement by the court, and now at this day, the court being fully advised in the premises, the said demurrer is sustained. It is therefore considered, ordered, and adjudged that the plaintiff have and recover of the defendant the sum of five thousand four hundred and sixty $\frac{96}{100}$ dollars in gold and silver coin and the costs in this behalf to be taxed.

9 STATE OF OREGON, *County of Lane, ss:*

I, A. A. Skinner, county clerk of said Lane county and ex officio clerk of the circuit court for said county, hereby certify the foregoing to be a true and correct transcript of the journal entries in the foregoing entitled cause.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said circuit court, this 18th day of August, 1865.

[L. S.] A. A. SKINNER. *County Clerk, &c.*

STATE OF OREGON, *County of Lane, ss:*

I, A. A. Skinner, county clerk of said county of Lane and ex officio clerk of the circuit court of the State of Oregon for said Lane county, hereby certify the foregoing to be a full, true, and perfect transcript of the judgment roll in the foregoing entitled cause now remaining in this office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said circuit court, this 21st day of August, A. D. 1865.

[L. S.] A. A. SKINNER, *County Clerk, &c.*

10 In the circuit court of the State of Oregon for the county of Lane.

Certificate for appeal.

STATE OF OREGON, pl'ff,
vs.
LANE COUNTY, def't.

LANE COUNTY, *ss:*

I, S. Ellsworth, an attorney of the supreme and circuit courts of the State of Oregon, do hereby certify that I have examined the

judgment of the court in the above-entitled action, entered August 4th, 1865, and that the said judgment is substantially erroneous.

1st. In sustaining plaintiff's demurrer to defendant's answer, and rendering judgment for plaintiff, notwithstanding the allegations of said answer.

2d. In not overruling the said demurrer, and rendering judgment for defendant upon the answer.

3d. The effect of said judgment is adverse to the provisions of an act of Congress approved Feb'y 25th, 1862.

4th. The said judgment wholly disregards a tender which is legal and sufficient.

11 5th. The said judgment provides for issuing of an execution contrary to law.

S. ELSWORTH, *Att'y.*

Title of action as within.

To the State of Oregon:

You are hereby notified that the defendant, Lane County, hereby appeals from the judgment of the circuit court of the State of Oregon for the county of Lane, rendered and entered upon the records of said court, August 4th, 1865, in your favor and against said defendant, for the sum of five thousand four hundred and sixty $\frac{96}{100}$ dollars in gold and silver coin, and the costs, said appeal being taken to the supreme court upon the grounds mentioned in the foregoing and within certificate.

S. ELSWORTH and D. M. RISDON,
Attorneys for Def't.

I, J. Jay Crawford, sheriff of Douglas county, Oregon, hereby certify that on this 18th day of August, 1865, I served the foregoing notice of appeal and certificate on J. F. Watson, prosecuting
12 attorney of the State, and attorney of record of the State in the said ation, by delivering to him on said day a true copy thereof, duly certified by defendant's attorney. Sheriff's fees $2 00.

J. JAY CRAWFORD,
Sheriff, Douglas Co., Oregon.

Filed August 26th, 1865.

A. A. SKINNER, *Co. Clerk.*

STATE OF OREGON, *County of Lane, ss:*

I, A. A. Skinner, county clerk of said county of Lane and ex officio clerk of the circuit court of the State of Oregon for Lane county, hereby certify the foregoing to be a true, full, and perfect transcript of the original certificate, notice of appeal, and the sheriff's return thereon indorsed, now remaining on file in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said circuit court this 28th day of August, 1865.

[L. S.] A. A. SKINNER, *County Clerk, &c.*

13 *Appeal from judgment of said circuit court by the defendant.*

In the circuit court of the State of Oregon for Lane county.

STATE OF OREGON, *County of Lane, ss:*

STATE OF OREGON
vs.
LANE COUNTY. } Civil action.

I, A. A. Skinner, county clerk of said county of Lane and ex officio clerk of said circuit court, hereby certify that the appellant in the above-entitled cause did, on the 25th day of August, 1865, file an undertaking for an appeal, and stay of proceedings also, with the following named sureties, to wit: A. A. Smith, C. Hackshaw, J. G. Gray, H. Parsons, R. H. Parsons, J. L. Gilbert, E. P. Coleman, J. J. Walton, sen'r, A. S. McClure, W. T. Osburn, Marion P. Martin, John Whittaker, Sam. Ashley, A. Renfrew, E. L. Bristow, A. J. Cruzan, A. W. Patterson, W. N. Luckey, Wm. Smith, Samuel Clifford, John Cogswell, Samuel B. Cranston.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said circuit court this 28th August, 1865.

[L. S.] A. A. SKINNER, *County Clerk, &c.*

Clerk's fees for this transcript $8 50, paid by appellant.

A. A. SKINNER, *County Clerk, &c.*

14 STATE OF OREGON
vs.
LANE COUNTY. } No. 33.

Filed in the supreme court September 2d, 1865.

R. WILLIAMS, *Clerk.*

STATE OF OREGON, respondent
vs.
LANE COUNTY, appellant. } Lane.

This day came Williams & Mallory and J. F. Watson, pros. att'y, of counsel for respondent, and D. M. Risdon, esqr., of counsel for appellant, and after argument by said counsel upon the error assigned in the record and proceedings in the court below, it is considered by the court that there is not error as alleged. It is therefore ordered and adjudged that the judgment herein in the court below rendered be in all things affirmed, and that demurrer to appellants answer be sustained, and that the matters and things
15 in appellants answer set forth do not constitute a defence herein, and that the respondent have and recover of and against the appellant, and of and against A. A. Smith, J. G. Gray, H. Parsons, R. H. Parsons, J. L. Gilbert, E. P. Coleman, J. J. Walton, sen'r, A. S. McClure, W. F. Osburn, Marion P. Martin, John Whitaker, Sam. Ashley, A. Renfrew, E. L. Bristow, A. J. Cruzan, A. W. Patterson, W. N. Luckey, Wm. Smith, Samuel Clifford, John Cogswell, and Sam'l B. Cranston, sureties in appeal, the sum of five thousand four hundred and sixty and $\frac{96}{100}$ dollars judgment in the court below, in gold coin, and ten per cent. interest thereon from the

day of the rendition of said judgment, in like gold coin, together with the costs and disbursements in the court below, and the sum of thirty-three and $\frac{75}{100}$ dollars costs in this court allowed, and that this cause be remanded to the court below for further proceedings herein, as by law provided.

STATE OF OREGON, *County of Marion, ss:*

I, R. Williams, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom, and the whole of such original, as the same appears of record and in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Salem, the 2d day of October, 1865.

[SEAL.] R. WILLIAMS, *Clerk.*

16 Know all men by these presents, that we Paul Brattain, Wm. Smith, M. H. Harlow, H. Parsons, E. L. Bristow, W. H. Hanchett, Samuel B. Cranston, A. McCornack, W. A. Potter, A. S. McClure, C. Hackshaw, Thomas Mulhollan, S. M. Dillard, John H. McClung, J. J. Walton, sen'r, C. W. Boren, J. G. Gray, of the county of Lane, in the State of Oregon, are held and firmly bound unto the State of Oregon in the full and just sum of fifteen thousand dollars, ($15,000,) to be paid to the said State of Oregon, its certain attorney or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this 30th day of September, in the year of our Lord one thousand eight hundred and sixty-five.

Whereas lately, at a supreme court of the State of Oregon, in a suit depending in said court between the State of Oregon and the county of Lane, judgment was rendered against the said

17 Lane county, and the said Lane county having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment rendered in the aforesaid suit, and a citation directed to the said State of Oregon, defendant in error, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next: Now the condition of the above obligation is such that if the said Lane county shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

PAUL BRATTAIN.	[L. S.]	A. S. McCLURE.	[L. S.]
WM. SMITH.	[L. S.]	C. HACKSHAW.	[L. S.]
M. H. HARLOW.	[L. S.]	THOS. MULHOLLAN.	[L. S.]
H. PARSONS.	[L. S.]	S. M. DILLARD.	[L. S.]
E. L. BRISTOW.	[L. S.]	JNO. H. McCLUNG.	[L. S.]
W. H. HANCHETT.	[L. S.]	J. J. WALTON, SEN.	[L. S.]
SAM'L B. CRANSTON.	[L. S.]	C. W. BOREN.	[L. S.]
A. McCORNACK.	[L. S.]	J. G. GRAY.	[L. S.]
W. A. POTTER.	[L. S.]		

18 Sealed and delivered in presence of—by seventeen obligors—
S. ELLSWORTH, *Att'y.*

STATE OF OREGON, *County of Marion, ss:*

I, R. Williams, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing copy has been by me compared with the original, and that it is a correct copy thereof, and the whole of such original, as the same appears of record and in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Salem, the 2 day of October, 1865.

[SEAL.] R. WILLIAMS, *Clerk.*

19 I hereby approve the within bond and certify that the within named obligors are known to me to be perfectly good and responsible for the within-named amount. Done this 30th day of Sept., A. D. 1865.

P. P. PRIM,
Chief Justice of the Supreme Court of the State of Oregon.

Filed in the supreme court Oct. 2, 1865.

[SEAL.] R. WILLIAMS, *Clerk.*

20 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the State of Oregon, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Oregon and the county of Lane, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the laws of the United States, and the decision was in favor of such their validity; also wherein was drawn in question the construction of a clause of a statute of the United States, to wit:

"An act to authorize the issue of United States notes and for the redemption or funding thereof, and for funding the floating debt of the United States," approved Feb. 25th, 1862; and the decision of your said court was against the right and privilege specially set up and claimed under such clause of the said statute; where-

21 upon a judgment was rendered against plaintiff in error for $5,460 96 in gold coin—a manifest error hath happened, to the great damage of the county of Lane, plaintiff in error, as by its petition appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the records and proceedings aforesaid being inspected the said

Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable S. P. Chase, Chief Justice of the said Supreme Court, the 30th day of September, (A. D. 1865,) in the
22 year of our Lord one thousand eight hundred and sixty-five, and D. W. Middleton, clerk of the Supreme Court of the United States.

Allowed by—

P. P. PRIM,
Chief Justice of the Supreme Court of the State of Oregon.

23 Filed in the Supreme Court, Oct. 2d, 1865.
R. WILLIAMS, *Clerk.*

24 The United States of America to the State of Oregon, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the in t Monday of December next, pursuant to a writ of error filed ththe clerk's office of the supreme court of the State of Oregon, wherein the county of Lane is plaintiff in error or appellant, and you, fire State of Oregon, are defendant in error, as in the said writ of error mentioned, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable chief justice of the supreme court of the State of Oregon, this 30th day of September, (1865,) in the year of our Lord one thousand eight hundred and sixty-five.

P. P. PRIM,
Chief Justice of the Supreme Court of Oregon.

Filed in supreme court October 11, 1865.
R. WILLIAMS, *Clerk.*

25 On this 4th day of October, in the year of our Lord one thousand eight hundred and sixty-five, personally appeared S. Ellsworth before me, the subscriber, and makes oath that he delivered a true copy of the within citation to A. C. Gibbs, governor of the State of Oregon, at Portland, Oregon, on the 2d day of October, 1865; also to Williams & Mallory, attorneys of record for the State of Oregon in the within-mentioned action, one of whom, Rufus Mallory, esq., is one of the prosecuting attorneys of the State, and by law its law officer, their being no attorney general, so called, in the State of Oregon, and such last-mentioned service was made at Salem, Oregon, on the 2d day of October, 1865; also on the same day to S. E. May, secretary of state of the State of Oregon.

R. WILLIAMS,
Clerk of Supreme Court, Oregon.

Filed November 30, 1865.

Supreme Court of the United States.

THE COUNTY OF LANE,

PLAINTIFS IN ERROR,

vs.

THE STATE OF OREGON,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF OF PLAINTIFF IN ERROR.

McGill & Witherow, Printers & Stereotypers, Washington, D.C.

Supreme Court of the United States.

THE COUNTY OF LANE, PLAINTIFF IN ERROR,

vs.

THE STATE OF OREGON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF FOR THE PLAINTIFF IN ERROR.

All the material allegations of the complaint are as follows:

1st. That the amount of the State revenue *due* from the county of Lane to the State of Oregon, for the year 1863, was $5,460 96.

2d. That the amount was *due* in *gold and silver coin.*

3d. That the amount was *due* on the first Monday of February, 1864.

4th. That no part of said amount has been paid.

5th. Prays judgment for said sum in *gold and silver coin.*

All the material allegations of the answer are as follows:

1st. Denies that said sum remains unpaid.

2d. Avers that on the 23d of January, 1864, the county did tender, and offer to pay to the State, the said sum in lawful money of the United States, to wit: United States Treasury or legal-tender notes.

3d. That the money so tendered, was out of the first money collected and paid into the county treasury of Lane county, after the assessment of the taxes for 1863.

4th. Alleges the keeping good of the tender.

5th. Pleads said tender in bar.

Demurrer to answer as follows:

1st. The answer does not show that the money alleged to have been tendered to the State treasurer was in *gold and silver coin.*

2d. The answer does not show that any tender was ever made, as required by law.

3d. The facts stated are not sufficient to constitute a defence.

This demurrer was sustained, and the circuit court ordered and adjudged "that the plaintiff (the State) have and recover of the defendant (the county) the sum of five thousand four hundred and sixty dollars and ninety-six cents, in gold and silver coin, and the costs."

This judgment was affirmed by the supreme court of the State.

No question can arise as to the sufficiency of the tender to constitute a bar, if the State revenue *due* from the county to the State could be paid in any lawful money of the United States.

Plaintiff in error maintains that the county of Lane was not bound to pay the said sum of $5,460 96 in gold and silver

coin, but had a right to pay the same in any other lawful money of the United States, for the following reasons:

The county was bound to pay said sum to the State "out of the first moneys collected and paid into the county treasury." (Sec. 46, p. 441, Statutes of Oregon.)

This tender was made, as the demurrer admits, out of the "first moneys collected and paid," as aforesaid.

No liability of the county to the State arises until moneys are collected and paid into the county treasury, as provided by law, and then the only liability of the county is to transfer to the State treasury so much of that identical money as will pay the amount charged to said county on the books of the State treasurer.

The taxes are, in fact, due from the individuals assessed to the State, and the county is only an agent for their collection; and whatever the tax-payers have a right to pay to the county the county has a right to pay to the State.

There was no law in the State of Oregon in 1863 requiring those to whom the taxes were assessed to pay the same in gold and silver coin, and therefore they had a right to pay in any lawful money.

Sec. 32, page 438, Statutes of Oregon, says that "the sheriff shall in all cases pay over to the county treasurer the full amount of State and school taxes in gold and silver coin." Sec. 46, page 441, says "the several county treasurers shall pay over to the State treasurer, in gold and silver coin, the State tax," &c. These two paragraphs are the only warrant found in the laws of Oregon for the proceedings in this case.

As to these, it may be said that they define the duties of officers charged with the collection of taxes, but do not define the right of tax-payers.

No doubt the inference from these paragraphs, standing alone, would be that the taxes were to be paid to said officers in gold and silver coin, but the right of a tax-payer to pay his taxes in such lawful money of the United States as he is bound to receive for all debts due him, ought not to be destroyed by an inference.

On the assessment roll each person named therein is taxed a certain number of "dollars and cents." The warrant attached to said roll empowers the sheriff to collect according to such assessment. There is nothing said in either as to whether the "dollars and cents" shall be gold or silver, or

copper or paper; and, as each is lawful money, the tax-payer is left to his choice. He is only bound to pay what the law of the land makes "dollars and cents," and the sheriff is only authorized to collect what the law calls "dollars and cents." Statutes of Oregon, pages 436 and 437.

Again, the paragraphs above cited are to be construed and reconciled with that other part of the same law requiring payment to the State to be made out of the "first moneys collected and paid into the county treasury." All together, they mean only that the county shall pay over gold and silver if collected.

The words gold and silver coin in this statute should be taken to mean no more or less than lawful money.

May not the court take judicial notice of the historical fact that, in the States upon the Pacific coast, prior to the late war and at the date of this act in question, nothing was recognized or in circulation as money except "coin?"

Referring to the act for the assessment and collection of taxes, (Statutes of Oregon, page 430,) the court will see that certain of the taxes therein named are made payable in "county orders," but the State and school taxes are to be paid by the county to the State in "gold and silver coin." This was intended to exclude from the State treasury all warrants, orders, or scrip that might be outstanding, and make the State revenue payable only in "money." "Gold and silver coin" and money were synonyms in Oregon at the date of the said act, and throughout its provisions it will be seen that "dollars and cents," "moneys," and "gold and silver coin" are used as exactly equivalent terms. Can it be supposed that the object of this legislation was to prohibit the payment of taxes in whatever was money of the United States and which was used as money for all other purposes?

Was it the particular metals named that the State wanted, or was it what it could use in every way and all persons would be bound to receive from it as money? Plaintiff in error claims that the court below erred in holding that the State laws warranted their judgment in this case.

On the 21st day of October, 1864, the legislative assembly of Oregon enacted as follows: "That all taxes levied in this State, by the authority of the State or a municipal corporation therein, upon any person or property in this State, shall be collected and paid in gold and silver coin of the United States, and not otherwise." This may be taken as a legislative opinion that, prior to that date, there was no such law in Oregon.

Assuming, however, that the law of the State always was as it is declared to be in the act of 1864, then it is claimed that such law is of no force, because it is in conflict with an act of Congress approved February 25, 1862, authorizing the issue of United States notes and providing that such notes "shall be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports; and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin; and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid."

Manifestly this act was intended to invest Treasury notes with all the attributes of money, with the exceptions specified, and they only prove the purpose of the law.

Expressio Unius est exclusio alterius.

Can the legislative power of a State deny to a citizen thereof and a citizen of the United States the right to pay his taxes in lawful money?

To determine what shall or shall not be money in the United States is an exclusive power in Congress.

When, therefore, Congress enacts that certain coin or paper shall be money, and compels every citizen to receive it as such, that enactment carries with it to the citizen receiving such coin or paper a corresponding right to pay it out as money, which right is beyond the reach of State legislation. To hold otherwise is to divest money of its circulating quality, in which consists its chief value. Has a State Legislature absolute power over the property of the citizens to be exercised under the guise of taxation?

According to the Constitution of Oregon, art. 1, "Private property shall not be taken for public use, nor the particular services of any man be demanded without just compensation." When, therefore, the Legislature of that State imposes a tax upon a citizen, and at the same time denies his right to pay it in money *ex necessitate*, his property must be taken for the public use; otherwise, the tax cannot be paid. To say that a citizen shall not pay his taxes in one kind of money includes the power to say that he shall not pay them in another kind of money.

To say that taxes shall not be paid in gold and silver is exercising no greater power than to say that they shall not

be paid in Treasury notes, for both are equally "lawful money."

Can a State government take from a citizen one-tenth or one-fifth of his stock or grain or land, and disguise the tyranny under the name of taxation, especially when the citizen is willing to pay his proportion of the public expenses in lawful money?

Suppose the legislative assembly of New York should declare that all taxes in that State should be paid and collected in gold and silver, and not otherwise—and New York and every other State has the same right in this respect as Oregon—what would follow?

Congress has compelled the people to have a currency which has excluded gold and silver from circulation, and, to a great extent, from the country. To pay the taxes, according to such a law, in that State, would be an absolute impossibility. To enforce their collection by a sale of property for gold and silver, when little or none could be procured, would be to rob the people of their property, by sacrificing thousands of dollars for one piece of coin. Would not such a proceeding be a violation of the spirit, if not the letter, of that part of the Constitution which says that private property shall not be taken for public use without just compensation?

What is the protection which a constitution gives to a citizen worth, if he can be stripped of his property by such reckless and unjust legislation?

No doubt State legislation may allow a citizen to pay his taxes in property or money, or extend any other indulgence to him in that respect, but can it compel him, at the peril of forfeiting the property assessed, to pay his taxes in something that may be so scarce or precious as to be beyond his reach, at the whim of the law-making power? May it not be safely assumed that, when a law of Congress makes Treasury notes lawful money of the United States, each citizen has, by virtue of that law, a right higher than State authority to pay all claims and demands against him, whether by State or individuals, in such lawful money?

Is the decision of the Supreme Court of Oregon correct

in holding that a tax is not a debt within the meaning of the aforesaid act of Congress?

Referring to the complaint in this case, it will be seen that judgment is claimed for a certain *sum of money* due from the county to the State.

Does not that describe a pecuniary obligation of the county?

May not a pecuniary obligation be discharged with lawful money?

Is not this suit in the nature of an action for money had and received by the county for the use of the State?

Webster defines a debt to be "that which is due from one to another, whether money, goods, or services; that which one is bound to pay or perform for another."

Worcester, Richardson, and Barclay concur in this definition.

Is not a tax lawfully assessed upon a person that which he "is bound to pay?"

Bouvier describes a debt "as a sum of money due by certain and express agreement. In a less technical sense, it means any claim for money. In a still more enlarged sense, it denotes any kind of a just demand." Is not a tax lawfully assessed a "claim for money?" Is it not a just demand?

To show that a tax is not a debt, reliance is placed upon the following authorities: The City of Camden *vs.* Allen, 2 Dutcher, N. J., 398; Pierce *vs.* The City of Boston, 3 Met., 520; Shaw *vs.* Pickett, 26 Vt., 482; Appleton *vs.* Hopkins, 5 Grey, 530; Perry *vs.* Washburn, 20 Cal., 318.

While the court, in Camden *vs.* Allen, *arguendo*, say that a tax is not a debt, the decision is that an action of debt will not lie for a tax where the statute provides another specific remedy. The Chief Justice says: "If, indeed, a tax should be unpaid, and no method provided by law for its recovery, a resort to legal proceedings would then be a necessity. There must be a redress for every wrong—a method of recovery for every due," &c.

Justice Polls says, quoting from Mr. Justice Story, in the case of the United States *vs.* Lyman, 1 Mason, C. C. R., 481: "When the debt arises by statute, an action or information by *debt* is the appropriate remedy, unless a different remedy be prescribed by statute." Again he says: "There is no doubt that, but for the principle which the defendant in this case evokes, (to wit: that the statute provides the remedy,) the *action of debt would lie for the recovery of a tax legally*

assessed." Pierce *vs.* The City of Boston, 3 Met., 520, decides that under the statutes of Massachusetts a tax is not a set-off. Shaw *vs.* Pickett, 26 Vt., 482, holds that under the statutes of that State interest cannot be collected upon a tax. Appleton *vs.* Hopkins, 5 Grey, 530, holds that an act abolishing imprisonment for debt, does not apply to a warrant of distress for non-payment of taxes.

To these authorities it may be answered that, a "debt" may exist and not be attachable; bear interest, or be the subject of a set-off. These are statutory and not common law incidents of a debt. 1st Tidd's Practice, 633. Drake on Attachment, [illegible] Bartlett *vs.* Marshall, 2 Bib., 469.

Percy *vs.* Washburn, 20 Cal., 318, is a case in point. It stands identically with the case at bar.

Prior to the act of Congress of February 25, 1862, the Supreme Court of California held that a tax was a debt. Moore *vs.* Patch, 12 Cal., 270. People *vs.* Smorer, 16 *Ibid.*, 340.

In the case of Multnomah county *vs.* The State, (1 Oregon Reports, 358,) Justice Stratton, in delivering the opinion of the court, and construing the State law, in question, says: "It is important to note the phraseology of these sections, as fixing the relations of the county and the State—the one becomes a *debtor* and the other a *creditor* for the amount charged, and on the day when the law has fixed the time of payment *it is a debt due*, and can be discharged only by payment, not in part but in full, as all other debts are discharged."

In the case of Rhodes *vs.* Farrell, 2 Nevada Reports, 60, Bently, Justice, holds that a tax is a debt within the meaning of the act of Congress, and may be paid in legal-tender notes. And Brosnan, Justice, holds that when judgment is recovered for a tax it may be discharged in the same way.

An action of debt will lie to recover a tax. Ohio *vs.* Hibbard, 3 Ohio R., 63. Ohio *vs.* Gazley, 5 Ohio R., 14.

Suppose the State of Oregon should sue a tax-payer in debt to recover the amount of the tax assessed against him, and the defendant should plead a tender of legal-tender notes, could the State defeat that tender by saying that the suit was not for a debt?

Chief Justice Shaw says, in Appleton *vs.* Hopkins, 5 Grey, 530, that "in a certain large and general sense taxes may be

said to be *debts* due to the Commonwealth, the county, town, and parish respectively."

Is not that the sense in which the word "debts" is used in the act of Congress? The words "public and private," in connection with the word "debts," indicate that it is used in a "large and general sense."

Debts in the statute is evidently used in place of "demands," and means the same thing. "Claims," "demands," and "debts" seem to be employed in this act without regard to technical definitions.

All the debates in Congress at the time the act was passed show that those who made Treasury notes legal tender expected that they would answer all the purposes of money and be employed to discharge all sorts of pecuniary obligations. (Con. Globe, vol. 57, page 549.)

Objection is made, in the language of Chief Justice Field, in the case of Perry *vs.* Washburn, Cal. R., page 318, that "a debt is a sum of money due by contract expressed or implied;" that a tax is not due by any such contract; therefore a tax is not a debt. It is not clear that when a tax is lawfully assessed against a person there is no implied contract on the part of such person to pay it. Government is under an obligation to protect the citizen, and there is a reciprocal obligation on the part of the citizen to support the Government.

Blackstone says (3 Com., 160) "that every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the statute or assessed by the interpretation of the law. For it is a part of the original contract, entered into by all mankind who partake of the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that State of which each individual is a member. What, therefore, the laws order any one to pay, that becomes instantly *a debt* which he has beforehand contracted to discharge."

When a judgment is recovered in an action *ex delicto* the law implies a promise on the part of the defendant to pay the judgment on which an action of debt will lie. (3 Black. Com., 160.)

Is the implication clearer upon such a judgment than it would be upon the lawful assessment of a tax? Will not legal tenders pay a judgment in an action for a tort?

California and Oregon courts stand upon the most narrow and limited definition of the term "debt," while the manifest intention of Congress was to make it equivalent to the term "demands."

Can it be supposed that Congress intended to ignore all claims for money arising *ex delicto*, including fines, penalties, and forfeitures?

According to the Statutes of Oregon, page 290, and doubtless it is so in other States, in an action for damages the defendant is allowed to plead that before suit he tendered a certain amount of money in satisfaction of the claim, and if the recovery does not exceed the tender, the defendant recovers his costs.

Suppose a suit is brought in Oregon for slander, and the defendant pleads that prior to the commencement of the suit he tendered to the plaintiff $1,000 in lawful money of the United States.

Would a demurrer lie to that answer on the ground that the action was not for a "debt," and therefore the tender should have been in "gold and silver coin?"

To hold the demurrer good in that case would be to decide that notes and bonds made prior to the act of Congress and upon a specie basis could be discharged in Treasury notes, while all claims for wrongs and injuries of every kind arising after the passage of said act must be satisfied in gold and silver coin.

State taxes are payable in legal-tender notes, or they are not; if not, it must be because all demands for money, of every name and nature, except those for a "sum certain, arising upon contract, express or implied," are not provided for by the act of Congress. If such taxes are payable in legal-tender notes by virtue of said act, then the legislative assembly of a State cannot destroy their congressional power and capacity.

Should all the foregoing views be possibly incorrect, it is submitted with the utmost confidence that the State legislation in question is void, because it clearly contravenes the financial policy of the Government.

When the act of February 25, 1862, was passed, the na-

tion was involved in a tremendously expensive war. Money was as necessary to the national existence as blood is to the life of the human body. Congress undertook to meet that necessity by investing Treasury notes with the attributes of money, chief among which is its capability for circulation. Any legislation, therefore, of the State of Oregon which excludes, or tends to exclude, those notes from circulation in that State is at war with the legislation of Congress.

If legal-tender notes can be excluded from circulation in Oregon, they can, of course, be excluded from circulation in New York, and so in every other State; and thus the act of Congress would be practically nullified.

Would a law of Oregon, expressly declaring that legal-tender notes should not circulate in that State, be valid?

Can the State do by "unfriendly legislation" what it cannot do by direct enactment?

Does not the law of the State in question tend to depreciate the value of the lawful money of the country?

To appreciate legal-tender notes, and make them as nearly as possible equal to "coin," was the very object of making them a "legal tender;" but the inevitable effect, if not the very object of the Oregon statute, is to reduce their value below the value of coin. Does not this make a clear conflict between Federal and State legislation? In the case of McCulloch *vs.* The State of Maryland, 4 Wheat., 316, the court say "that the States have no power, by taxation or *otherwise*, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government,

To carry into execution the power to suppress insurrection, vested in the General Government, it was enacted by Congress, in the act of February 25, 1862, that Treasury notes should be lawful money, and a legal tender for debt. Do not the laws of California and Oregon, which declare that a certain class of debtors shall not pay their debts in Treasury notes, and that the people of those States shall not use them for the payment of taxes, retard, impede, burden, and, to some extent, control the operation of said act of Congress? What would be the effect of laws in all the States like those in Oregon and California?

All the cases in this court holding that a State has no power

to tax the stocks, bonds, or other securities of the United States, are antagonistical to the decision of the court below in this case.

Bank of Commerce *vs.* New York City, 2 Black., 620, and cases there cited.

All these cases proceed upon the ground that a State Legislature has no right to burden or embarrass the means employed by the General Government in the execution of its powers.

Legal-tender notes are clearly a "means" within the purview of these decisions.

Treasury notes, issued and made legal tender, is one of the modes of "borrowing money on the credit of the United States."

Government owes an individual a debt, and compels him, therefor, to take one of these notes. This is, in effect, borrowing from the holder of such note the sum expressed upon its face until the note can be redeemed in coin. Legal tenders do not stand upon exactly the same footing as bonds, because the notes are declared to be money, and as such may possibly be taxed; but if a State should impose ten per cent. more tax upon them than upon other money, such tax would be clearly void.

Such a tax would interfere with the power of the General Government to borrow money in the State where it was levied. Granting this power to the States, and they could drive Treasury notes out of circulation.

Assuming the right of the General Government to make Treasury notes money, then the Government is as much bound to protect it as to protect gold and silver from depreciation. Any right to regulate the circulation of this currency is a right to destroy. If the States have any, they have an unlimited jurisdiction over the subject.

Weston *vs.* the City of Charleston, 2 Peters, 449.

To protect commerce, to uphold the rights of the citizen, to equalize the burdens of the Government, it is necessary to hold that, exclusive of the exceptions made by Congress, legal-tender notes are everywhere within the United States, and for all purposes, "lawful money."

There is no power in a court of law, without statutory authority, to render judgment for "gold and silver coin." When an execution issues, for what kind of money is property to be sold, and how, after sale, can it be redeemed? To what extent, in subsequent proceedings, does the judgment of the court carry power to reject "lawful money?"

All the law in Oregon, in 1863, upon the subject, are the two provisions above cited, that the sheriff should pay to the county treasurer, and the county treasurer shall pay into the State treasury, the State taxes in gold and silver coin.

Clearly a court of law has no power to decree a specific performance of these sections of the statute.

Had Congress, on the 25th of February, 1862, the constitutional power to make Treasury notes a legal tender for the payment of debts?

Congress has express power "to pay the debts and provide for the common defence and general welfare of the United States;" to "borrow money on the credit of the United States."

"To raise and support armies."

"To provide and maintain a navy."

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasions."

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof."

When the act in question was passed, it is undeniably true that Congress was compelled to "raise and support armies, and to provide and maintain a navy," for the suppression of a gigantic insurrection, or relinquish to that insurrection the life of the nation.

When this act was reported to the Senate by the Committee on Finance, the chairman said:

"It is put on the ground of absolute, overwhelming necessity, that the Government has now arrived at that point when it must have funds, and those funds are not to be obtained from ordinary sources, or from any of the expedients to which we have heretofore had recourse, and, therefore, this

new, anomalous, and remarkable provision must be resorted to in order to enable the Government to pay off the debt that it now owes, and afford circulation which will be available for other purposes."

Congress, having affirmed the necessities of the nation as set forth in this statement, its decision is irreversible by any other department of the Government.

Chief Justice Marshall, in McCulloch *vs.* Maryland, (4 Wheaton, 421,) says:

"But, we think, the sound construction of the Constitution must allow to the national legislature *that discretion with respect to the means by which the powers it confers are to be carried into execution*, which will enable that body to perform the high duties assigned to it in the manner most benefical to the people. Let the end be legitimate. Let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the lettter and spirit of the Constitution, are constitutional."

Treasury notes were made legal tenders not as an "end," but as a means. "To suppress the rebellion was a legitimate end. Treasury notes made legal tender were a "means plainly adapted to that end." They are not prohibited, but consist with the letter and spirit of the Constitution.

When the Constitution gives to Congress the express power to "suppress insurrection," it clearly implies that all means necessary for the execution of that power may be employed.

The power in Congress to "suppress insurrection" is an absolute and unlimited power.

Hamilton says, (Federalist No. 23,) that "there *can be no limitation* of that authority which is to provide for the defence and protection of the community, or any matter essential to the formation, direction, or support of the national forces."

When the Government is called upon to "suppress insurrection," it may force the citizen to give his services, property, and life for the common defence, and certainly within this boundless scope of jurisdiction, and for the same pur-

pose, may be found the power to make Treasury notes a tender for the payment of debts.

Congress has power "to borrow money upon the credit of the United States."

Legal tender notes, if not in one sense a loan upon "the credit of the United States," were certainly "means" without which such loans could not have been effected.

Loans were absolutely necessary during the rebellion, and it was the exclusive right of Congress to decide as to the mode, manner, or means of making such loans.

No court can rightfully review and reverse the judgment of Congress upon that subject.

How can it be claimed that the discretion of the legislature is subject to the discretion of the judiciary when both have equal opportunities of knowing and both are equally bound to decide wisely and justly as to the necessities of the country?

Reliance is placed upon the proceedings of the convention that framed the Constitution to prove that Congress has no power to make Treasury notes a legal tender.

All the proceedings of that convention show that the men who composed it were unwilling that Congress should have the same substantive power to emit bills of credit "as to coin money," but that the right to emit bills of credit should only be exercised as incidental to the execution of an express power and upon extraordinary occasions.

Acts of Congress authorizing the issue of Treasury notes have been passed as follows: June 30, 1812; February 25, 1813; March 4, 1814; December 26, 1814; October 12, 1837; January 31, 1842; August 31, 1842; July 26, 1846; January 28, 1847; December 23, 1857.

President Madison approved the act of June 30, 1812, which made Treasury notes a legal tender for duties and taxes owing to and for public lands sold by the United States, and in his annual message to Congress of December 5, 1815, he says: "The absence of the precious metals will, it is believed, be a temporary evil, but until they can again be rendered the general medium of exchange it devolves on the wisdom of Congress to provide a *substitute* which shall

equally engage the confidence, and accommodate the wants of the citizens throughout the Union. If the operation of the State banks cannot produce this result, the probable operation of a national bank will merit consideration, and if neither of these expedients be deemed effectual, it may become necessary to ascertain the terms upon which the notes of the Government no longer required as an instrument of credit, shall be issued upon motives of general policy *as a common medium of circulation.*"

Mr. Justice Story in Thorndike *vs.* United States, 2 Mason, says: "By the statutes of the United States, under which Treasury notes have been from time to time issued, is is enacted that such notes shall be receivable in payment to the United States for duties, taxes, and sales of public lands to the full amount of the principal and interest accruing due on such notes. It follows, of course, that they are a *legal tender* in payment of debts of this nature due to the United States, and by the very tenure of the acts, public officers are bound to receive them."

May not Congress, if it has power to make Treasury notes a legal tender for one purpose, make them a tender for all purposes?

To say that in the acts above referred to, the Government only made Treasury notes a tender in payment to itself avails nothing, for Congress has the same power over contracts between individuals, as it has over contracts to which it is a party. (Evans *vs.* Eaton, 1 Peters, C. C. Rep., 322.)

To hold that Treasury notes under the act of February 25, 1862, were lawful tender for debts then existing, does not impair the obligation of contracts. (Farr *vs.* Martilla, 2 Cranch., 20; Dowmans *vs.* Dowmans, 1 Wash., Va. R., 26; Cory *vs.* Lindsey, 1 Dyer, 82 A.; United States *vs.* Robertson, 5 Peters, 644.)

"No State," says the Constitution, "shall make anything but gold and silver coin a tender in payment of debts," but there is no such prohibition upon the General Government. Why was one included and the other excluded, if no difference was intended?

Sec. 9 of article 1st and the first eight articles of the

Amendment to the Constitution, imply that Congress may exercise power not expressly delegated, and, therefore, it was considered necessary to make such prohibitions and limitations upon what would otherwise be the absolute sovereignty of the Federal Government.

No express power is given to Congress by the Constitution to make anything a legal tender for the payment of debts.

Gold and silver coins issued by the mint of the United States were made lawful tender by the act of April 2, 1792.

Foreign coins have been made legal tender for all debts. (Acts April 10, 1806; March 3, 1823; June 25, 1834; March 3, 1843.)

By the act of February 27, 1853, the half-dollar, and coins of lesser denomination, were debased in value, and as so debased were declared to be legal tender.

How does it appear that it is more unconstitutional to make a Treasury note legal tender than it is to make a piece of debased or foreign coin legal tender?

Many implied powers as great and more doubtful than the one in question have been exercised by Congress, such as laying an embargo, acquiring foreign territory, establishing a national bank, and these have been sanctioned by all the departments of the Government upon the greund so clearly laid down by Chief Justice Marshall in McCulloch *vs.* Maryland that "*it is the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional power of the Government.*"

Courts will not declare a law void because they doubt its wisdom or necessity, but only when its repugnancy to the Constitution is plain and clear. (Morris *vs.* The People, 3d Denio, 881.)

Chief Justice Marshall says, in Fletcher *vs.* Peck, 6 Cranch, 87, that "the opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Chief Justice Savage, in *ex parte* McCollom, 1 Cowen, 564,

says that "a case must be presented in which there is no reasonable doubt."

Chief Justice Parker, in Adams *vs.* Howe, 14 Mass, 345, says "a court will pronounce a law constitutional unless the contrary clearly appears, so that in any case substantially doubtful the law will have its force."

The act of Congress passed February 25, 1862, is constitutional. (Metropolitan Bank *vs.* Van Dyck, 27 New York R., page 400. Thayer *vs.* Hedges, 23 Ind. R., 141.)

GEO. H. WILLIAMS,

Counsel for Plaintiff in Error.

Supreme Court of the United States.

THE COUNTY OF LANE, Plaintiff in Error,

versus

THE STATE OF OREGON, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF FOR THE DEFENDANT IN ERROR.

RUFUS MALLORY,
COUNSEL FOR DEFENDANT IN ERROR.

McGILL & WITHEROW, Printers and Stereotypers, Washington, D. C.

Supreme Court of the United States.

THE COUNTY OF LANE, PLAINTIFF IN ERROR,

vs.

THE STATE OF OREGON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF FOR THE DEFENDANT IN ERROR.

The complaint claims judgment against the county of Lane, plaintiff in error, for five thousand four hundred and sixty and $\frac{96}{100}$ dollars in gold and silver coin, the amount of revenue due the State from that county for the year 1863.

The answer admits the amount, (the *amount* claimed to be due,) and pleads a tender of payment in legal-tender notes of the United States.

The answer is demurred to, for the reason—

1. The answer does not show that the money alleged to have been tendered to the State treasurer was in *gold* and *silver coin*.

2. The answer does not show that any tender was made, as required by law.

3. The facts stated are not sufficient to constitute a defence.

The demurrer was sustained by the circuit court, and judgment rendered for the sum named in the complaint, in gold and silver coin.

The supreme court affirmed the judgment of the circuit court.

If no other question than the construction of the statute of Oregon were involved in this case, there could be no doubt that the judgment of the court below would be affirmed.

The statute of Oregon (page 441, sec. 46) provides that "the several county treasurers shall pay over to the State

treasurer, in *gold* or *silver coin*, the State tax," &c., "on or before," &c., "out of the first moneys collected and paid into the county treasury." By this law the county treasurer has no authority to pay, and the State treasurer no right to receive, anything but gold and silver coin for the State tax levied against the county.

The statute further provides, (page 438, sec. 32,) that "the sheriff shall, in all cases, pay to the county treasurer the full amount of State and school tax in gold and silver coin." These two sections of the law require the sheriff to pay to the county treasurer, in coin, the State and school tax, and the county treasurer to pay to the State treasurer the coin also, and, for the purpose of hastening the payment of the tax to the State, a clause is added, requiring that it be paid out of the *first money* collected and paid into the county treasury. To what "*first* money" does the law refer? Clearly such only as is made receivable by the law for State and school taxes, and that is "gold and silver coin." It matters nothing what other money may have been in the county treasury, if it was not gold and silver it could not be paid for State taxes. If the words "first money," as used in the law, mean anything but gold and silver coin, then, prior to the act of February 25, 1862, the sheriff could have paid to the county, and that to the State, whatever he chose to obtain that is called money, no matter whether gold and silver, copper, worthless bank-bills, Continental or Confederate money. It need only to be the first money collected and paid into the county treasury, to make it a valid tender for State and school taxes. It need not have been *lawful money*. The language of the statute is not that. It is simply the first *money* collected and paid, &c. It is evident that the words "first money," as used in this clause, mean, and can mean, nothing else than gold and silver coin. It means and specifically refers to the money which the sheriff is required to pay to the county treasurer, and he to the State treasurer, for the State tax. It means that *kind* of money that the statute makes receivable for that purpose, and can mean no other. There can therefore be no doubt that by the statute of Oregon the county treasurer was required to pay to the State treasurer the whole amount of the State tax in gold and silver coin, prior to the passage of the act of February 25, 1862, and therefore, by that law, any allegation that a tender was made in payment of such tax out of the first moneys collected and paid into the county treasury, without the allegation that it was offered in gold

and silver coin, could be no bar to an action for the recovery of the tax in coin.

Suppose that a sum of money had been paid to the county on the first day of the month, in coin, sufficient to pay the whole State tax, and suppose on the last day of the month a similar sum had been paid, will it be pretended that if the last sum were offered to the treasurer, he could refuse to receive it for the reason that it was not the first money collected and paid into the county treasury? Most certainly not. This, then, disposes of the *first-money* question, and shows it was only put into the law to hasten the payment of the State taxes, and nothing more. It is claimed by the plaintiff in error "that no liability of the county to the State arises until moneys are collected and paid into the county treasury, as provided by law, and then the only liability of the county is to transfer to the State treasury so much of that identical money as will pay the amount charged to the county on the books of the State treasurer." So far as this proposition is concerned, it can argue nothing in this case. The question as to whether the money has been paid over to the county treasurer, "as provided by law," is one of fact, and could only be raised upon an issue made between the complaint and answer, or between the answer and replication. The answer in this case admits that the money was paid to the county treasurer according to law. The condition of the case, then, with only the law of Oregon before the court, is that the sheriff of Lane county paid over to the treasurer $5,460 96 in gold and silver coin, and the treasurer has kept that in his pocket and put in its place $5,460 96 of a currency worth at the time of the tender fifty or sixty cents on the dollar. Had there been an allegation in the answer that there had not been received into the county treasury a sufficient sum in gold and silver coin to pay the State tax, it would have put this case in a different shape altogether. But such an averment could not be made and sworn to. Such a statement, I venture to assert, would not be in accordance with the facts. The currency of our State is coin; and paper money is procured only by a special effort in the way of purchase, as other merchandise is obtained.

It is claimed that there is no law providing the manner in which the citizen shall pay his tax to the sheriff, no provision to prepare the sheriff with the necessary means to pay the county treasurer the State tax.

This is a question which cannot affect the validity of this

pleading. By the law of Oregon, the sheriff is required to pay to the county treasurer the State and school tax in coin. How it comes into his hands is no question here for the court. To pay coin is one of the duties of his office, one the law imposes upon him, and the court has no more right to inquire into his ability to perform it, in deciding this case, than they would be required to know his ability to perform were he required by law to make a pilgrimage to Mecca or kiss the Pope's toe. He knew the duties of his office when he accepted it, and he must perform one or resign the other. It is not for the court to examine how the tax stands charged on the assessment roll, or what is the form of the warrant. If, as is claimed by the plaintiff in error, the tax-payer is left to his choice to pay any kind of *lawful money*, in the absence of a statute prescribing a particular mode of payment, it is at least a negative allegation that a statute prescribing a particular mode would deprive him of the power of choosing. Now if the rule is good in the case of a tax-payer, it is equally good when applied to a sheriff or county treasurer. While the law is silent in the case of a tax-payer, it is as plain as words can make it in the case of the sheriff and treasurer. While it leaves the former free to choose, it binds the latter to a certain course, and leaves him no alternative.

But the plaintiff in error mainly relies upon the act of Congress approved February 25, 1862, to maintain his case. It is claimed that this act abolishes the provisions of the statute referred to, and makes paper, and not gold and silver coin, receivable in payment of State taxes. The act, among other things, provides that the notes authorized by it "shall be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports; and of all claims and demands against the United States of every kind whatsoever, except for interest on bonds and notes, which shall be paid in coin; and shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest, as aforesaid."

The act contains language that fixes its extent and limitation in the plainest possible manner. By it, these notes are made receivable by the United States in payment of taxes, internal duties, excises, debts, and demands. They are payable on all *claims* and *demands* against the United States, except interest on bonds and notes. The United States pay no tax, no internal duties, no excises; but there are *claims* and *demands* which they are required to pay, and for which these

notes are made receivable, except for interest. These two clauses provide only in what cases the United States must receive and disburse them. They effect the people in no way, only as they become liable to pay taxes, internal duties, or excises to the United States, or become their debtor or creditor.

It is not pretended that these clauses affect in any manner affairs between citizens, or between a citizen and a State, or between States—it is only when the United States is one of the parties. The last clause of the act above quoted is where the plaintiff in error claims to find authority for his action, "And shall be lawful money and a legal tender in payment of all debts, public and private, within the United States," &c.

As the two clauses already considered specifically enumerate all the purposes for which these notes are to be received or paid by the United States, so, in providing for their use by the people, it has been equally specific in designating the purposes to which they shall be applied, and for which alone they shall be a legal tender. The language is not, as in the first clause of the law, all taxes, internal duties, excises, debts, and demands within the United States, but is simply debts, public and private, within the United States, making no mention of taxes, internal duties, or excises. If, as is claimed by the plaintiff in error, the words debts, public and private, are so comprehensive in their signification as to include also taxes, internal duties, and excises, what, then, was the necessity of incorporating them into the law providing the purposes for which the notes are receivable by the United States? Was it essential that the law should be more definite, and stated in stronger terms, and more of them, in cases where these notes were to be received by the United States than where they were to be paid out by it, or where they were to be made lawful money, receivable for all purposes, and to become the circulating medium of the country?

If the words taxes, internal duties, and excises are synonymous with debts, public and private, then, surely, the Legislature is guilty of having encumbered the statutes with unnecessary and meaningless words. But let us examine the facts of the case and see what they will develop.

Prior, at the time, and subsequent to the enactment of this law, were taxes levied upon the people of the United States, and were the people required to pay them? If they were, then the word taxes, as employed in the law, was not without meaning. Were internal duties an existing source from which the Treasury of the United States was in part supplied? Then

"internal duties," as used in the law, was not tautology, for it specifically points out how this kind of revenue may be paid. Is our exchequer in part supplied with funds from excise? Then the term "excises," as used in the act, was designed for something more than to add force to an idea already expressed. As the act provides for the payment of taxes, internal duties, and excises, each of which is a source from which the National Treasury is in part supplied, so it also provides that not only these, but that debts and demands due to the United States may be paid in these notes. There is a specific object in the functions of the Government to which each of these terms applies, and neither is equivalent to or can stand instead of the other.

The second clause of the law contains no such specification of items as the first, not because it is not necessary that this part of the law should be as forcibly stated as the other, but for the reasons already adverted to, that the United States pay no taxes, no internal duties, no excises, but it is required to pay "claims and demands;" and this is the language of the law. It might be well said, if the language of the first clause were repeated here, that it was a needless repetition of meaningless words, showing clearly that it was the design of the law-makers to positively state and distinctly enumerate all the purposes for which these notes were to be used, leaving no room to doubt what they intended to do. The last clause makes these notes "*lawful money* and a legal tender for all debts, public and private, within the United States." Debts, public and private, are all the purposes for which these notes are made lawful money and a legal tender. Is it fair to conclude that the law-makers, after specifying definitely for what purposes the notes should be received and paid by the United States, they would generalize when they attempt to exercise the doubtful, if not the unconstitutional, power of making them lawful money and a legal tender? The same reason exists for particularizing taxes, internal duties, and excises due to others than the United States, if it was the intention of the law-maker to make these notes lawful money and a legal tender in payment of them as when paid to the United States. Taxes, internal duties, and excises are collected by States "within the United States" from their citizens; debts exist and are payable and collected by one citizen from another, by one State from another, by a citizen from a State, and by a State from a citizen, yet these *debts* bear no manner of similarity to taxes, internal duties, or excises. The debt due from one citizen to another is a private debt

to which the law has reference; that due from one State to another, or from a State to a citizen, is a public debt, thus requiring the use of the term debts, *public* and *private*, as they are employed in the law, that both classes of obligation should be included. That these notes were intended by the law-makers to be lawful money and a legal tender in payment of all debts, public and private, within the United States is as well established as they are receivable for taxes, internal duties, excises, debts, and demands due to the United States. In the latter case a classification is made of all the purposes to which these notes may be applied when paid to the United States; but in making them lawful money and a legal tender one single item of all the list is singled out, and for that alone they are made lawful money and a legal tender. The law-makers are not ignorant of the fact that taxes, internal duties, excises, and debts exist within the United States other than those payable to the United States, yet they have selected from among them debts alone, and made these notes lawful money and a legal tender in payment of them. There cannot, therefore, be any other conclusion than that it was the intention of the law-makers to pay *debts only* with this lawful-money legal-tender currency, and leave the matter of taxes, internal duties, and excises other than those payable to the United States as though this act had never been passed.

The maxim *Expressio unius est exclusio alterius* applies here to its fullest extent. But it is claimed by the plaintiff in error that a tax and a debt are one and the same; that the two words are synonymous, or at least that the word debt, as used in the law, includes also taxes. Whatever may be the meaning of the word tax in other connections, it does seem to me that it not only is not used here as synonymous with it, but directly in contradistinction to it; and if a tax is not a debt within the meaning of this law, then the plaintiff in error has no case in court. That a tax is not a debt within the meaning of the law, we are not without authority to establish. (The City of Camden *vs.* Allen, 2 Dutcher N. J, 398; Peirce *vs.* The City of Boston, 3 Met,. 520; Shaw *vs.* Pickett, 26 Vt., 482; Hopkins *vs.* Appleton, 5 Grey, 520; Perry *vs.* Washburn, 20 Cal., 318.)

The points summed up in these cases are, that an action of debt will not lie to recover a tax; a tax is not a set-off; does not bear interest; a tax will not out-law. Debts are recognized and regulated at common law, while taxes depend wholly upon statutory enactments for their existence. Debts arise upon contracts, express or implied. A tax is a demand

by the governing power upon the governed for a portion of his substance, which he is compelled to give whether he will or not. In the case of Perry *vs.* Washburn, (20 Cal., 270,) the question is argued at length, and the case is summed up by his honor Justice Field, then chief justice of the supreme court of California, and the court there held that a tax is not a debt within the meaning of this act, and that it was not the intention of Congress to make these notes receivable for State taxes, or for any tax, except those enumerated in the act itself. In the case of The State *vs.* Multnomah county, (1 Oregon Rep., 358,) cited by the plaintiff in error, while it is true the court said, when the tax due from the county to the State was charged on the books of the State treasurer, it became a *debt due*, it was not for the purpose of deciding that a tax meant a debt that this language was used. By the law of Oregon, then in force, the county treasurer was allowed two per cent. on all moneys collected, and two per cent. on all moneys disbursed by him. The amount of State tax due from Multnomah county was ascertained by the secretary of State from the assessment roll, and was charged in the proper books in the offices of the secretary and treasurer. When the county treasurer paid over the State revenue to the State treasurer, he retained his percentage (four per cent.) for receiving and disbursing, so the sum paid did not balance the account against the county by the amount of this percentage retained. Suit was commenced to collect this balance, and the court came to the conclusion that the whole sum charged against the county must be paid—that it was a fixed amount that could not be diminished by the amount of his percentage. True, the court said it became a debt due; that the relation of debtor and creditor existed between the county and State; yet all that was decided was that the amount of the tax was a fixed sum, and nothing more. And it will be further observed that the justice who delivered the opinion of the court in that case is the same before whom this suit was commenced, and who sustained this demurrer in the first instance, and whose decision was affirmed by the supreme court from which the cause comes here.

The authorities cited show that in their legal signification the words tax and debt are not synonymous, and that the latter is not equivalent to and does not include the former. But even if the rule were found to be otherwise in the general use of the two words, the peculiar mode in which they are employed in this law gives them a meaning distinct from

each other. Had the words "claims and demands" been used in the law, in place of the words "debts, public and private," there might then be some foundation for the construction claimed for it by the plaintiff in error. But, instead of using terms so general, they have chosen to use one of limited signification, which has been defined by the judgment of the court below, which judgment this court cannot do otherwise than affirm.

But suppose the construction contended for by the plaintiff in error is adopted, an obstacle more serious than any other is at once presented. If it was the intention of the Congress to make these notes receivable for State taxes, a question as to their constitutional power to carry that intention into effect at once arises. The right of a State, under the Constitution, to a distinct municipal organization, in no other manner subject to the will of Congress than that its constitution is republican in form, necessarily carries with it the right to support and maintain that organization without congressional permission or congressional dictation.

If a State has the right to choose officers for its own government, it certainly has the right to provide a salary and the means of its payment. If Congress possess the power to dictate what one shall be, it may take control of all. If it has power to say in what the tax of a State shall be paid, it has the power to say how much, by, and to whom it shall be paid. If it has power to control the mode in which an officer shall receive his salary, it may also create the office and name the officer. To give such power to Congress would be to place the States entirely at the mercy of that body for their existence. To place the control of the revenue of a State in the hands of Congress would be no less destructive to that State than to place the breath of one human body in the control of another. To deny this power to the State and vest it in Congress is the utter annihilation of all State sovereignty and a consolidation of the Government into a simple republic.

Among the powers denied to the States by the Constitution is that of making anything but gold and silver a legal tender in the payment of debts. The Constitution does not, in express terms or by necessary implication, deny to the State the right to make anything else than gold and silver a legal tender in payment of taxes, and if a State may make that a legal tender for taxes which it is not a legal tender for debts, it may certainly select any of that which the United

States has made lawful money and a legal tender in payment of debts, and make it alone receivable for taxes.

What power is in Congress to prevent Oregon from collecting her taxes in any specific article, and what right to say that that article shall or shall not be gold and silver in the shape of United States coin? Manifestly none; and if Congress has attempted to deprive her of that power by legislation, such legislation is without authority of the Constitution, and therefore void.

The construction given to this act of February 25, 1862, by the court below and in the California case above cited did not involve the constitutionality of the act, but that contended for by the plaintiff in error brings up the whole question of the constitutional power of Congress to pass the law, and that power the defendant in error denies, and cites the following:

Judge Collamer's speech in Senate United States, February 12, 1862, on legal-tender note bill.

See page 767, extract Chase's letter.

See page 767, Story on the Constitution.

See page 768, Story on the Constitution.

See page 769 to 771, extract from proceedings in Convention to form Constitution; also note from Madison.

See page 788, Collamer's amendment.

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